In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1423

JOHN CAMPOPIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the indictment against him should have been dismissed because of a delay between the commission of the offense and arrest and delay between arrest and indictment.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of receiving, concealing and facilitating the transportation and concealment of heroin known to be illegally imported in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to five years' imprisonment. The court of appeals affirmed. 446 F. 2d 869 (C.A. 2). This Court granted certiorari (408 U.S. 915), vacated the judgment and remanded the case for further consideration in light of the Court's opinion in *Barker* v. *Wingo*, 407 U.S. 514. Additional briefs were filed in the court of appeals and after reconsideration the judgment of conviction was again affirmed (Pet. App. A.).

The facts relevant to the issue of delay are that the offense was committed on July 5, 1967, and the complaint was filed and a bench warrant issued for petitioner's arrest on July 6, 1967 (App. 18a).[1] Petitioner was arrested nine months later on April 8, 1968. The indictment was returned twenty-one months thereafter on January 12, 1970, and trial was commenced eleven months later on December 8, 1970. Petitioner's claim of delay relates primarily to the nine-month period between the commission of the offense and his arrest in April 1968. He asserts prejudice from this delay on the basis of a claim that he disposed of his personal business diary for the year 1967 during the first 60 days of 1968. He contends that this diary might have established his whereabouts on the date of the offense.

As the court of appeals found, evidence at trial showed that during this nine-month period a "reasonably active search" for petitioner was conducted. During this time, informants were questioned on numerous occasions (App. 24a-25a), wanted posters for petitioner's arrest were distributed to the New York City Police and the FBI (App. 25a-26a), and surveillance was conducted by agents of the Bureau of Narcotics and Dangerous Drugs of petitioner's residence and known haunts on at least fifteen different occasions (App. 140a-141a, 194a-195a). The agents testified that during this period of surveillance they did not knock on petitioner's door to inquire about him (App. 132a-133a, 141a-142a). When information was received that petitioner had returned from Florida shortly before April 4, 1968, he was speedily apprehended (App. 25a).

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[1] "App." refers to the appendix in the court of appeals on the original appeal, a copy of which is being lodged with the Clerk.

While petitioner's evidence raised a question of fact as to his presence during the period (App. 246a), the finding of the court of appeals that there was a "reasonably active search" for petitioner and that the delay was reasonable under the circumstances (Pet. App. 2b) is supported by the record.

Despite the filing of the complaint, petitioner was neither under arrest nor otherwise subjected to restraint during this nine-month period. This pre-arrest delay was the result of the government's inability to apprehend petitioner sooner despite reasonable efforts to do so. Thus, there was no denial of either due process or the right to a speedy trial. The Sixth Amendment's speedy trial provision does not apply to "the period prior to arrest." *United States* v. *Marion*, 404 U.S. 307, 321. And, while the government conceded in *Marion* that the Fifth Amendment "would require dismissal of the indictment if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to [a defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused" (404 U.S. at 324), no such showing has been made here. Indeed, even under the Sixth Amendment standards of *Barker* v. *Wingo, supra*, the possible prejudice from the claimed disposal of the business diary here is not sufficient to overbalance the reasonableness of the delay.

Petitioner also claims that he was prejudiced because the complaint filed in July 1967 charged that he and another were in possession of the heroin, while the indictment omitted the reference to the other person and charged petitioner alone. This claim apparently relates to the period between petitioner's arrest in April 1968 and the return of the indictment in January 1970.

The complaint, however, merely serves as a basis for the issuance of the warrant of arrest. Since there is no claim here that the arrest itself was invalid or that any evidence produced incident to the arrest was used at trial, petitioner's claim that the complaint was incorrect in this respect is immaterial. Since petitioner raises no other claim of specific prejudice attributable to the delay between the arrest and the indictment, and since there is no allegation that the government purposely caused this delay to obtain an advantage over petitioner, the court of appeals correctly applied the standards of *Barker* v. *Wingo* in upholding petitioner's conviction.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

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[2]Since the record contained the facts required by the court of appeals to apply the standards of *Barker* v. *Wingo*, there is no merit to petitioner's suggestion that the case should be remanded to the district court for further consideration.

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